Petition

81-947

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In the

Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

MARGARET TREBBE AND LETHA TREBBE,

Petitioners,

v.

STATE OF COLORADO,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF COLORADO

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October, 1981

QUESTIONS PRESENTED

Petitioners, Margaret and Letha Trebbe were convicted of witness tampering, in violation of § 18-8-605, Colorado Revised Statutes 1973. The question presented for review pertains to the exclusion, by the trial court, of questions directed to the principal prosecution witness, one Linda Walton, as to said Walton's bias, hostility, and predisposition towards falsity, to wit:

1. Whether accused persons are accorded a fair trial and the right of confrontation where full cross-examination of the complaining witness is precluded, despite the tendency of such sought cross-examination to demonstrate the witness' predisposition to lie and her bias and hostility towards petitioners.

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MARGARET TREBBE AND LETHA TREBBE, *Petitioners*

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STATE OF COLORADO, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

The petitioners, Margaret Trebbe and Letha Trebbe, pray that a writ of certiorari issue to review the judgment and opinion of the Colorado Court of Appeals entered on April 9, 1981.

OPINION BELOW

The opinion of the Colorado Court of Appeals, not published, appears in the appendix hereto.

JURISDICTION

The judgment of the Colorado Court of Appeals was entered April 9, 1981, and petition for rehearing denied April 30, 1981. Certiorari to the Colorado Supreme Court was denied August 10, 1981, rendering the opinion of the Court of Appeals final for certiorari purposes. This petition for certiorari was filed within sixty days. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. The title, right, privilege, or immunity claimed denied is the right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED

Petitioners, Margaret and Letha Trebbe were convicted of witness tampering, in violation of § 18-8-605, Colorado Revised Statutes 1973. The question presented for review pertains to the exclusion, by the trial court, of questions directed to the principal prosecution witness, one Linda Walton, as to said Walton's bias, hostility, and predisposition towards falsity, to wit:

1. Whether accused persons are accorded a fair trial and the right of confrontation where full cross-examination of the complaining witness is precluded, despite the tendency of such sought cross-examination to demonstrate the witness' predisposition to lie and her bias and hostility towards petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .."

Amendment XIV:

> ". . .No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .."

STATEMENT OF THE CASE

Letha and Margaret Trebbe, mother and daughter, were convicted of witness tampering based solely on the testimony of Linda Walton, the allegedly tampered witness. Margaret Trebbe, a successful real estate broker, had been unsuccessfully prosecuted previously in the same county on a felony menacing charge involving an uninvited visitor who came unannounced upon her property. This prior menacing trial was hotly contested, and several personal accusations were made by the prosecutors, during the trial, against petitioner, Margaret Trebbe.

Following Margaret Trebbe's acquittal, those same prosecutors initiated and instigated an investigation of both Margaret and Letha Trebbe for alleged witness bribery and tampering. Both prosecutors claimed that they had seen Margaret and Letha Trebbe talking on a pay telephone outside the courtroom where the felony menacing trial was taking place, and that after that telephone call, the prosecutors were unable to make service on an as yet unsubpoenaed witness at her place of employment, a beauty salon, where petitioner Letha Trebbe also worked. Although the two prosecutors never voiced their suspicions at the time, upset and unhappy after the verdict of acquittal which followed, they then began an investigation of the Trebbes for prosecution on witness tampering charges.

Immediately thereafter, witness Walton was contacted by one of the law enforcement officials who had before unsuccessfully sought to serve her with a subpoena. At that time, she completely denied receiving any calls from the Trebbes asking her not to testify or to avoid service of process. She was then told by the investigator that the district attorney's office would investigate her non-appearance "to the fullest extent", and that the investigator was "going to get (Margaret Trebbe) sometime, someplace, somehow", or words to that effect.

Witness Walton later changed her mind, and claimed that both Letha and Margaret Trebbe had called her at the beauty salon during the previous trial on several occasions, and that in least some of the calls, she was encouraged to avoid service of the subpoena so as not to be forced to testify.

Both Walton and her employer, who was not involved in the case, testified that Walton had left the beauty salon, prior to being served with process, not because of any phone calls, but because of her own free will as she "did not want to get involved in the case". The jury was thus presented with the factual question as to why Linda Walton left the beauty salon.

Both Trebbes testified that only Letha Trebbe talked on the telephone, and that all that she did was ask Linda Walton to take some of her hair appointments that afternoon. Walton, on the other hand, claimed that the Trebbes had asked her to leave and avoid being served with the subpoena. Credibility was thus crucial.

Despite this, however, defense counsel was precluded from cross-examining Walton as to the welfare fraud perpetrated by her, which included false swearings under oath, and as to her hostility and bias against petitioner Margaret Trebbe for reporting to the authorities that Walton had falsely applied for benefits while working both as a real estate broker and as a beautician. This curtailment of cross-examination denied defendants-petitioners their right of confrontation. Both mother and daughter were found guilty of tampering; the bribery charge ended in a verdict of acquittal.

REASONS FOR GRANTING THE WRIT

I. WHETHER AN ACCUSED IS ACCORDED A FAIR TRIAL IN COMPLIANCE WITH THE RIGHT OF CONFRONTATION WHERE THE DEFENSE IS COMPLETELY REPCLUDED FROM CROSS-EXAMINING THE COMPLAINING WITNESS AS TO BIAS AND A PREDISPOSITION TO FABRICATION.

The Sixth Amendment right of effective legal representation and confrontation of witnesses is guaranteed via the Fourteenth Amendment in state as well as federal criminal proceedings, and accordingly, to the same standards which protect that right against federal encroachment. Davis v. Alaska 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 958 (1968); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). Full cross-examination is the gravamen of this right. Morse v. Wilson, 500 F.2d 1264 (10th Cir. 1975), cert. denied, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 821. Thus, one primary interest secured by the confrontation clause is the right of effective and complete cross-examination. Davis v. Alaska, supra; Smith v. Illinois, supra; Douglas v. Alabama, supra.

A proper and important function of the constitutionally protected right of complete cross-examination is to reveal any bias or self interest the witness may have as a motivation for a particular claim or testimony. Davis v. Alaska, supra, 415 U.S. at 316; Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). See also Tla-Koo-Yel-Lee v. United 167 U.S. 274, 17 S.Ct. 855, 42 L.Ed. 166 (1897). The purpose to be served is to enlighten jurors so that they will gain a proper perspective to evaluate prosecution evidence, in order that they may sift out the truth. See United States v. Downey, 454 F.2d 373 (10th Cir. 1972).

Petitioners were denied this important constitutional right of confrontation. Defense counsel was not permitted to cross-examine witness Walton as to the welfare fraud she had perpetrated and her resultant bias and hostility against Margaret Trebbe because Trebbe turned her in. The trial court denied such questioning summarily, on the grounds that it merely went to propensity to fabrication, although this also would have been a valid ground for cross-examination.

In affirming, the Colorado Court of Appeals held that it would only consider the question on a "plain error" basis, based on its erroneous perception that the issue of examination for bias was not properly preserved for appeal. This had the effect

of depriving petitioners of their right to appellate review altogether, for although it was done somewhat inartfully, trial counsel did adequately make a record by stating that one of the purposes of his cross-examination of witness Walton was to show her bias. This was more than adequate to accord the trial judge a fair opportunity to correct his ruling, and thus, to preserve the issue for appellate review. The refusal of the Colorado Court of Appeals to fairly consider this question compounded the trial court's unfair restriction of cross-examination.

Although a trial court normally has broad discretion in determining the scope of cross-examination, it does not have the authority to deny cross-examination. "(T)his discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." United States v. Elliott, 571 F.2d 880, 908 (5th Cir. 1978), cert. denied, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), quoting United States v. Bass, 490 F.2d 846, 858 n. 12 (5th Cir. 1974); see also Chipman v. Mercer, 628 F.2d 528 (9th Cir. 1980).

The test as to whether the trial court's ruling violated the Sixth Amendment is "whether the jury had sufficient information to appraise the bias and motives of the witness." Skinner v. Cardwell, 564 F.2d 1381, 1389 (9th Cir. 1977), cert. denied, 435 U.S. 1009, 98 S.Ct. 1883, 56 L.Ed.2d 392 (1978); Chipman v. Mercer, supra.

It is essential to defendant's right to a fair trial that they be given "every opportunity to show bias", Carman v. State, 604 P.2d 1076 (Alaska 1979) (emphasis added), so that the jury can knowledgeably weigh the witness' credibility. Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931).

When the accused in a criminal proceeding seeks to cross-examine the prosecution's key witness, the importance of providing wide latitude in the scope of cross-examination is necessarily increased. Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953); Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980); United States v. Barrentine, 591 F.2d 1069 (5th Cir. 1979), cert. denied, 444 U.S. 990, 100 S.Ct. 521 (1979). Instances in which it is sought to be shown that the witness

testified adversely to defendant because of hostility appear with such frequency that the necessity to permit full cross-examination to show bias should be readily apparent to the trial court. Chipman v. Mercer, supra.

This Honorable Court has repeatedly held that denial of the right of effective cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it". Davis v. Alaska, supra; Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966) See also Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 16 L.Ed.2d 956 (1968); Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." Alford v. United States, supra. Thus, the restrictions placed upon petitioners' right to have their lawyer fully cross-examine the state's key witness cannot be considered anything but plain error, and clearly, any conviction which results from a restriction of such cross-examination is unconstitutionally obtained.

Complete cross-examination of prosecution witnesses as to their motivation is a matter of right, no privilege; in all cases where credibility is "of the highest importance", as it was here, it is reversible error to preclude cross-examination on the question of bias. Tla-Koo-Yel-Lee v. United States, supra. Moreover, the sought cross-examination was proper as demonstrating the witness' propensity to disregard the obligations of a sworn oath. The witness had made false swearings in a welfare application seeking benefits while working two jobs. Although some courts preclude specific act evidence entirely, see Britton v. Commonwealth, 123 Ky. 411, 96 S.W. 556 (1906), more enlightened jurisdictions give full regard to the confrontation clause by according accused persons full rein in adducing evidence of specific acts of prior misconduct on the part of a prosecution witness. See, e.g., State v. Apley, 25 N.D. 298, 141 N.W. 740 (1913). Full cross-examination as to prior falsification is crucial where, as here, it was precisely the prior falsification which resulted in the hostility and bias of the witness against the accused.

The right of inquiry as to bias and untruthfulness, to put in question a witness' credibility, is clearly of the highest constitutional order. Davis v. Alaska, supra. Bias and falsehoods thwart justice. Thus, a state trial court simply cannot exclude competent evidence of bias and untruthfulness which bears on the credibility of a witness in a criminal case. Davis v. Alaska, supra. Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975). Prior perjury and bias bear directly on veracity, and thus are always relevant and admissible, even if collateral, for false swearing and hostile motivation cut at the heart of our fact-finding system. United States v. Varelli, 407 F.2d 735 (10th Cir. 1969). See also Davis v. Alaska, supra.

In the trial in this case, cross-examination probative of an absence of credibility, of untruthfulness and bias, was precluded completely by the trial judge. The defense was thus unable to put before the jury evidence of the witness' propensity to disregard her sworn word and let her anger at Margaret Trebbe color her sworn testimony. Since evidence of circumstances indicative of bias is always admissible, even if it has a tendency to impugn the moral character of the witness, see, e.g., Thompkins v. United States, 236 A.2d 443(D.C.App 1967); Jones v. Schanck, 248 F2d 658 D.C.Cert. (1957), denial of the defense right to confrontation and examination in this regard as to the uncorroborated testimony of the key prosecution witness rendered their convictions constitutionally invalid and consequently, this Honorable Court should grant this petition for writ of certiorari to review the affirmance of these unjust convictions by the Colorado Court of Appeals.

CONCLUSION

Petitioners Trebbe were denied their constitutional right to confront the key prosecution witness against them, and pray that this Honorable Court grant certiorari to review the decision of the Colorado Court of Appeals.

APPENDIX A

NOT PUBLISHED

COLORADO COURT OF APPEALS

No. 79CA1095

The People of the State of Colorado,
Plaintiff-Appellee,

v.

Margaret Trebbe and Letha Trebbe,
Defendants-Appellants.

Appeal from the District Court of
Arapahoe County
Honorable Richard L. Eason, Judge

DIVISION III JUDGMENT AFFIRMED

Opinion by JUDGE SILVERSTEIN*
Kirsnbaum and Tursi, JJ., concur

J.D. MacFarlane, Attorney General
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*Retired Court of Appeals Judge sitting by assignment of the Chief Justice under provisions of the Colo. Const., Art. VI, Sec. 5(3), and § 24-51-607(5), C.R.S. 1973 (1980 Cum. Supp.).

Defendants, Martha and Letha Trebbe, appeal from their convictions on charges of tampering with a witness, in violation of §18-8-605, C.R.S. 1973 (1978 Repl. Vol. 8). We affirm.

Defendants were accused of having attempted to induce Linda Walton to avoid legal process summoning her to testify in a case in which Margaret Trebbe had been charged with felony menacing. Margaret was acquitted by a jury of that charge.

I.

Linda Walton testified for the prosecution in the present case. On cross-examination, in order to attack her credibility, defendants attempted to elicit testimony that the witness had falsified portions of a welfare application. The trial court refused to admint the testimony. On appeal, defendants assert that the evidence should have been admitted to show Walton's propensity to disregard oaths, and also to show bias. We find no error.

The trial court held that evidence regarding the witness' reputation for truth and veracity could be admitted, but that specific instances of misconduct could not be used. This had long been the rule in Colorado. People v. Crawford, 191 Colo. 504, 553 P.2d (1976); see Tarling v. People, 69 Colo. 477, 194 P. 939 (1921); (Colorado Rules of Evidence 405(a) was not in effect at the date of this trial.)

The scope and limits of a defendant's right to cross-examine witnesses is within the sound discretion of the trial court, People v. Crawford, supra, and, "cross-examination related to one's general credibility can be limited consistently with an accused's right of confrontation." People v. Williams, 40 Colo. App. 30, 569 P.2d 339 (1977). We find no abuse of discretion here.

Defendants' contention that the evidence should have been admitted to show bias, based on the fact that one of the defendants reported the false statements to the authorities, is not properly before this court. The evidence of false information was offered at trial solely on the truth and veracity issue, and the bias issue was not raised in the motion for new trial. Absent a showing of plain error, we cannot consider the issue. People v. Brionez, 39 Colo. App. 396, 570 P.2d 1296 (1977). In view of the fact that other evidence disclosed an animosity between the witness and one of the defendants, we find no plain error.

II.

Defendants next assert that the trial court erroneously permitted the People to cross-examine Letha Trebbe about her having sought a restraining order against her daughter, the other defendant. We find no error.

The questions asked did not go into the merits of the civil action, and were asked in order to elicit testimony contrary to statements given by defendant Letha on direct examination. This is a proper basis for impeachment. The requirements of § 16-10-201, C.R.S. 1973 (1978 Repl. Vol. 8) were met, and the cross-examination pertained to a relevant issue. Therefore, there was no error. See People v. Grant, 40 Colo. App. 46, 571 P.2d 1111 (1977).

III.

Defendants further contend that the trial court erred in not permitting the attorney who represented Margaret Trebbe in the felony menacing case to testify as to the nature of the charges in that case. The evidence was offered to prove that because of the weak nature of the prosecution's case, defendants had no reason to tamper with any witnesses' testimony.

However, the attorney did testify that he and his client refused to accept any plea arrangement because in 20 years of trial he had never seen such a weak case. He further testified that he had told defendants that Walton, if called, would be a "nothing witness," that her testimony would be inadmissible, and that he did not care if she was called or not.

Thus, the evidence relative to lack of motive was admitted, and the trial court's refusal to permit testimony as to the specific issues in the prior proceeding was not error. As was stated in People v. Key, 185 Colo. 72, 522 P.2d 719 (1974): "Appellant was given a full and fair opportunity to develop his theory of defense and we find no abuse of discretion in the court's evidentiary rulings in this respect."

Judgment affirmed.

JUDGE KIRSHBAUM and JUDGE TURSI concur.

IN THE COURT OF APPEALS

OF THE STATE OF COLORADO

Case Number 79CA1095

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff-Appellee,	)	
vs.	)	O R D E R
MARGARET TREBBE and LETHA TREBBE,	)	
Defendants-Appellants.	)	

Upon consideration of the Petition for Rehearing filed by the Appellants herein, said Petition is hereby DENIED. Unless otherwise ordered, mandate will issue May 7, 1981.

BY THE COURT, Kirshbaum, Tursi and Silverstain, JJ.

Dated: April 30, 1981

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 81SC149 April Term, 1981

MARGARET TREBBE and LETHA TREBBE,	)	
Petitioners,	)	Certiorari to the Colorado
vs.	)	Court of Appeals
THE PEOPLE OF THE STATE OF COLORADO,	)	No. 79CA1095
Respondents.	)	

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

CHIEF JUSTICE HODGES does not participate.

AUGUST 10, 1981

By the Supreme
Court
Sitting En Banc

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